No. 2839

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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W. H. WOOLDRIDGE
*Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA
*Defendant in Error*

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Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division

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## Brief of Plaintiff in Error

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## STATEMENT OF THE CASE.

This case is one wherein the defendant below and plaintiff in error here, W. H. Wooldridge, was indicted February 18, 1916, on two counts, the first being for statutory rape alleged to have been committed on December 23, 1914, and the second for an attempt to commit rape on February 14, 1916, upon the person of Laura Herrington, a female person under the age of sixteen years, the said Wooldridge being over the age of sixteen years, as set forth in the indictment attempted to be drawn under the

provisions of Sections 1894 and 2073, Compiled Laws of Alaska, 1913. Under this indictment defendant was held in jail without bail, and to both counts of said indictment Wooldridge plead not guilty.

Transcript of Record, pp. 4-9.

The plaintiff in error Wooldridge is a white man, fifty-two years of age, with a family consisting of a wife and three children, and the prosecutrix Laura Herrington is a girl fourteen and one-half years old. Upon the trial of the case before a jury in the court at Fairbanks, Alaska, lasting from March 6 to March 14, 1916, the said Wooldridge was acquitted of the crime charged in the first count and convicted of the crime of attempt to commit rape charged in the second count of said indictment.

Transcript of Record, pp. 4-6, 42, 76, 520.

It appears from the record and evidence produced at the trial of the case that said Wooldridge had located at Fairbanks, Alaska, about the same time the Herrington family did when gold was discovered there in 1903, and that they had been acquainted since that time.

Transcript of Record, pp. 384, 521.

The record and evidence also shows that said Wooldridge had incurred the bitter enmity of the United States marshal, L. T. Irwin, and the United States attorney, R. F. Roth, because he had as a

notary public acknowledged the signature and affixed his seal to an affidavit against Marshal Irwin and likewise to an affidavit against United States Attorney Roth.

Transcript of Record, pp. 18-24, 336-338, 577, 578, 581.

The United States marshal, L. T. Irwin, his deputies and agents, the United States attorney, R. F. Roth, and his agents laid a trap for said Wooldridge, enveigled him into the same and got rid of him by sending him to the penitentiary. In this scheme they secured the co-operation of the girl and her parents.

Transcript of Record, pp. 71-74, 97, 137, 138, 191, 315-321, 383, 407-409, 413.

The girl *alone* testified that she and Wooldridge on the evening of February 14, 1916, made arrangements to meet the next evening at 8 o'clock at J. P. Rose's bicycle repair shop on Lacey Street, in the Town of Fairbanks, Alaska. This was positively denied by Wooldridge.

Transcript of Record, pp. 96, 533.

On the evening of February 15, 1916, said Wooldridge was in the repair shop of J. P. Rose visiting with Rose, as he was accustomed to do for a few minutes four or five times a week, when this girl came into Rose's shop, and Wooldridge testified that she said that somebody was following her and she wanted to hide, but she denied that.

Transcript of Record, pp. 234, 235, 537.

It developed that five deputy marshals were on watch there, and two of them were back of Rose's back room, where they had holes cut through the partition wall to see and hear what happened, and within a very few feet of Rose, Wooldridge and the Herrington girl, so that they could hear and see everything that was said and done.

Transcript of Record, pp. 274-277, 368.

The prosecution offered in evidence plaintiff's exhibit 1, an alleged statement of J. P. Rose, forced from Rose late at night in the office of the United States marshal by five deputy marshals, without place or date designating where it was taken or when, for the purpose of impeaching their own witness Rose, and this was objected to by defendant, but overruled by the court.

Transcript of Record, pp. 229-231, 302.

No demurrer to the indictment was interposed by defendant, but objections to the introduction of evidence were duly made and taken at the trial by the defendant before any testimony was given, as provided by Section 2207, Compiled Laws of Alaska, 1913, for the reason that the alleged facts stated in the second count of the indictment do not constitute a crime, which objection was overruled by the court; exception to said ruling was duly made by defendant and same granted.

Transcript of Record, pp. 75, 76.

At the close of the Government's case in chief, defendant moved for an instructed verdict of not guilty upon the second count of said indictment, for the reasons that (a) the allegations contained in the second count of the indictment are not sufficient to constitute a crime; (b) there is not sufficient evidence produced upon the part of the prosecution to sustain the allegation of said second count if the same did constitute a crime; (c) the evidence adduced on the part of the prosecution is insufficient to warrant the jury in returning a verdict of guilty thereon in that no proof of an attempt toward the commission of the crime of rape had been established, which motion was denied by the court, excepted to by the defendant and exception duly allowed.

Transcript of Record, pp. 487, 488.

This same motion for instructed verdict of not guilty on the second count of said indictment was made when all the evidence on both sides was in, on the grounds that (a) the allegations contained in said second count in said indictment are not sufficient to constitute a crime, in that there are no facts alleged of an attempt, no facts alleged as to the commission of any acts, or the attempted commission of any acts, toward the consummation of the crime of rape; (b) the evidence introduced in this case is insufficient to support a verdict of guilty, and it does not even tend to prove any acts or any attempt to commit any acts toward the consummation of the offense alleged; and (c) the said

second count in said indictment does not attempt to state the commission of any crime, which motion was denied by the court, excepted to by the defendant and exceptions duly allowed.

Transcript of Record, pp. 597, 598.

There were also many other motions and objections made by the defendant and interposed to the evidence introduced by the prosecution, which the court denied and overruled and to which the defendant duly excepted, and said exceptions were allowed, and particularly were objections and motions made to the admission of details in connection with the complaint first made by the prosecutrix, as testified to by the prosecutrix, Ed Hall and Catherine Herrington, and likewise to the admission of the testimony of the witness J. H. Miller with reference to what prosecutrix told him during the month of February, 1916, in Roth's office and elsewhere as to Wooldridge having had sexual intercourse with her, and all that testimony relating thereto when they were laying a trap for Wooldridge in Roth's office and elsewhere, for the reasons that it was hearsay, said statements of prosecutrix to the witness Miller having been made some fourteen months after the alleged offense charged in the first count of the indictment occurred, and in the absence of the defendant Wooldridge.

Transcript of Record, pp. 83-87, 202-203, 314-321.

Likewise the defendant took exceptions to many of the court's instructions to the jury, because they did not state the law correctly, and said exceptions were allowed, and said defendant requested certain instructions, which stated the law correctly, to be given to the jury, practically all of which were refused by the court.

Transcript of Record, pp. 617-629.

Following the verdict of guilty on the second count rendered by the jury, defendant filed a motion for a new trial, because of (a) irregularities in the proceedings of the court and abuse of discretion exercised by the court by which defendant was prevented from having a fair trial; (b) insufficiency of the evidence to justify the verdict of guilty upon said second count in said indictment and that it is against the law; and (c) errors in law occurring at the trial and duly excepted to by defendant; and defendant also filed a motion in arrest of judgment because the facts stated in said second count of indictment did not constitute a crime, and both of these motions were denied by the court, exceptions duly taken by the defendant and allowed by the court.

Transcript of Record, pp. 43-63.

That on account of (1) irregularities in the proceedings of the court and abuse of discretion exercised by the court whereby defendant was prevented from having a fair trial; (2) the errors of law occurring at the trial; and (3) the insufficiency

of the evidence, the defendant was unjustly convicted upon the second count in said indictment whereby he was charged with the attempt to commit the crime of rape, judgment was entered against him and he was sentenced to serve a term of six years in the United States penitentiary at McNeil's Island, in the County of Pierce, State of Washington, and it is to reverse this judgment that plaintiff in error, W. H. Wooldridge, is now here before this court, and for that purpose he relies upon the following

## ASSIGNMENT OF ERRORS.

### I.

The court erred in overruling defendant's objection to the introduction of any testimony whatever under the indictment and the two counts thereof, for the reason and upon the grounds that the statement of facts set forth therein (count two) do not constitute a crime; excepted to by defendant.

### II.

The court erred in allowing the testimony of Laura Herrington, a witness for the prosecution, to go to the jury during the trial of said cause over the objection of defendant's counsel, to the effect that she had a conversation with Ed Hall (a witness) and told Ed Hall that she had been out that night with Wooldridge, and that Wooldridge had given her two dollars and a half and owed her a

dollar more, all of which was duly excepted to by defendant.

III.

The court erred in allowing the testimony of said witness Laura Herrington to go before the jury during said trial over the objection of defendant's counsel, to the effect that two or three days after her alleged meeting with Wooldridge she met her sister Catherine on the street one day and "had a talk with her about the (642) affair that occurred between her and Wooldridge," and "I showed her the money"; duly excepted to by defendant.

IV.

The court erred in admitting the testimony of Ed Hall, a witness for the prosecution, before the jury during said trial over the objections of defendant's counsel, to the effect that he met Laura Herrington at Morency's home two or three days before Christmas and "she showed me two dollars and a half which she said she got from Wooldridge and would get a dollar more," which was for going to a cabin with Wooldridge, who had done something to her; duly excepted to by defendant.

V.

The court erred in admitting the testimony of George Berg, a witness for the prosecution, before the jury during said trial, over the objections of defendant's counsel, and motion to strike same as to what was said and done in Rose's shop Febru-

ary 15, 1916, about 8 o'clock P. M., the same being the conclusions of witness from what he afterwards heard and not what he heard or witnessed, the testimony showing that he (Berg) admitted he could not hear what was said, "only a word now and then"; excepted to by defendant.

VI.

The court erred in admitting the testimony of said witness George Berg before the jury at said trial over the objection of defendant's counsel, to the effect "some time in the fore part of February I was informed I was to undertake the investigation of Wooldridge and learn whether or not Laura Herrington was telling the truth," and testimony of like and similar character; exceptions by defendant.

VII.

The court erred in allowing the testimony of J. H. Miller, a deputy marshal, a witness for the Government, to go before the jury at said trial over the objections of defendant's counsel, to the effect that Roth, the United States attorney, first apprised witness of facts out of which the indictment grew, and that Roth requested witness to get Laura Herrington and her father and bring them to Roth's (643) office; and witness sent Berg out and he got them, brought them up and had a conversation regarding another case of a similar nature, the Bobby Jones case; then Roth or I asked her (Laura Herrington) if anyone else had ever both-

ered her, and she stated Wooldridge had; then I asked her if Wooldridge had ever bothered her or attempted a thing like that since, and she said to me that Wooldridge had many times, that he had bothered her many times since that time. I told her if he ever bothered her again and tried to make a date with her to go ahead and make a date with him and then let me know about it, and she said she would do so. My idea was to get them together and determine from their conversation whether the girl was telling the truth. The next I heard was when her father, George Herrington, came to me February 14, 1916, and told me his girl had made a date that evening with Wooldridge; then I went down and looked over the house to see if I could put men in there, asked Berg to get a man. I got one and went down and prepared the three men and the house. Berg returned that nothing came of it, so I wanted to go down there and find out from the girl why the arrangement had not been carried out. Next morning George Herrington came to the office and told me after Berg and I had left Wooldridge came to the house and she had made a date with him at Rose's bicycle shop for 8 o'clock next evening. I went up and took a look around Rose's shop to see if there were a chance to place anybody there in shape to overhear a conversation between these people. I found a place through McDermott's store. Then I called my deputies and told them of my plan, told Frank Hall, a deputy, to get the keys of Judge Pratt's office, told McMullen,

another deputy, to go with Hall. I told Deputy Berg and Deputy Wood to place themselves by a door where they could see and listen, and I stayed outside and met the girl and her father. I told the girl to talk "about the time you claim Wooldridge had sexual intercourse with you," and she said she would. And I also told her, "if anything comes up," to say "be careful." or some such words, and there would be something that would cause a stop, but to hold a conversation with him, to the admission of which testimony, and the whole and every part thereof (644), objection was repeatedly made by defendant's counsel, overruled and excepted to. Motion was made by defendant's counsel to strike same and every part thereof, and denied by the court, which exception was duly taken.

VIII.

The court erred in allowing the testimony of said J. H. Miller over the objection of defendant's counsel to the effect that "Berg and I started to take the girl home; we got down a little ways and we concluded if we wanted to get the truth we had better question Mr. Rose before he and Wooldridge talked together. I went to the office and sent Deputy McMullen after Mr. Rose, and I asked him, took a pad of paper; I had the other boys come in. I asked him some questions; he volunteered some 'questions'; Berg spoke to him about parts of his statement and I wrote them all down, repeated it, handed him the paper and told him to read it. He

hadn't his glasses, and I told Deputy Hall to read it. Rose signed it and swore to it." (Paper, Plaintiff's Exhibit 1, shown witness), and all testimony of like and similar nature, which was objected to by defendant's counsel, who also moved to strike such testimony of Miller, and every part and portion thereof, which motion was denied and exception taken.

IX.

The court erred in allowing the testimony of J. P. Rose, a witness for the prosecution upon said trial, upon the objections of defendant's counsel, as to what had been said and had occurred in his place, as he had stated same to Chief Deputy Miller and the other deputies in the absence of the defendant.

X.

The court erred in allowing the testimony of witness George Berg for the prosecution upon said trial, over the objections of defendant's counsel, as to what Berg said what Rose had said, and what Miller and Hall had said, in the marshal's office relative to what had occurred in Rose's place of business that evening in the absence of defendant, and as to what Berg himself said upon the same subject to Rose and others during the absence of defendant (645).

XI.

The court erred in permitting the testimony of P. McMullen, a witness for the prosecution upon said trial, over the objections of defendant's counsel, as to the conversation had by and with witness

Miller, Berg, Rose and others in the marshal's office in the absence of defendant.

XII.

The court erred in permitting the testimony of J. P. Rose, a witness for the prosecution upon said trial, over the objections of defendant's counsel, as to his testimony before the grand jury in the absence of defendant.

XIII.

The court erred in permitting the testimony of J. P. Norris, R. M. Crawford, H. N. Shead, William Pendergraft and Tom Utigaard, members of the grand jury and witnesses for the prosecution upon said trial, over the objections of defendant's counsel, to the effect that the witness Rose was sworn before said grand jury, and that Government counsel read witnesses' purported extracts from the purported signed statements of witness Rose and asked them if that was what Rose testified to before the grand jury, to which questions the said witnesses, and each of them, answered "Yes," and like and similar questions, all of which were duly excepted to by defendant's counsel, overruled, exceptions taken, moved to be stricken, denied, and exceptions taken.

XIV.

The court erred in permitting the introduction in evidence before said jury at said trial, over the objections of defendant's counsel, of the alleged signed statement of J. P. Rose, marked Plaintiff's Exhibit One (1).

XV.

The court erred in permitting the testimony of Laura Herrington, a witness for the prosecution, to go before the jury at said trial over the objection of defendant's counsel, upon her redirect examination, to the effect: "Q. Did you lay down on the coat? A. Yes. Q. Were your legs apart? A. Yes." (646). "Q. What did defendant do to you? A. I can't explain it. Q. Did you have sexual intercourse? A. Yes."

XV.

The court erred in refusing to permit Bion A. Dodge to testify on behalf of the defendant at said trial, upon objections by Government counsel, relative to the witness, Mrs. George Herrington, having told him that Wooldridge had loaned her a dollar, which testimony was excluded upon the grounds that a proper foundation had not been laid.

XVI.

The court erred in refusing to permit J. E. Clark, clerk of the court, a witness called on behalf of the defendant, to testify at said trial, over the objection of Government counsel, in answer to the following question propounded by defendant's counsel: "Have you among your records a record in your office of an indictment against J. P. Rose for rape?"

XVII.

The court erred in denying the motion made by the defendant's counsel, upon the close of the testi-

mony of the Government, that the court direct the jury to return a verdict of not guilty upon the second count in the indictment, upon the grounds, in substance, that the evidence was insufficient to justify a verdict of guilty and that it was against the law, and that upon motion for a new trial the court should set a verdict of guilty aside, and that the testimony fails to establish the commission of the offense charged, or any offense; there was no intent, no overt act, and whatever was done amounted at the most to but solicitation, and the Alaska statute making an attempt a substantive offense solicitation is not an attempt; that the testimony did not disclose any act tending to prove the commencement of the consummation of any attempt whatever, and also that the defendant was not prevented or intercepted by any person or persons whomsoever or cause whatsoever, and also that said second count failed to charge any offense under the Alaska statute.

XVIII.

The court erred in denying the motion made by the defendant (647) upon the close of the testimony of the Government, in substance, that the Government then and there elect upon which count in said indictment the Government would stand, and upon which count it would elect to have a verdict found, which motion was denied and exception taken by defendant's counsel.

XIX.

The court erred in denying the renewal of the motion of defendant to instruct the jury to find a verdict of not guilty upon the conclusion of all of the testimony, substantially upon the same ground as stated upon the previous motion, to the denial of which motion defendant excepted.

XX.

The court erred in refusing to give to the jury the following instruction during the course of the charge to the jury:

INSTRUCTION No. 1.

The court instructs the jury that they are the sole judges of the credibility of any witnesses who testified in this case, and if they believe from the evidence that any witness has testified falsely herein, they are at liberty to disbelieve his or her testimony, in whole or in part. And if any witness before testifying in this case has made any statement out of court, concerning any of the material matters, materially different and at variance with what he or she stated on the witness stand, then this jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of such witness; and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony.

XXI.

The said court erred in refusing to give to the jury the following instruction:

INSTRUCTION No. 2.

The jury is instructed that evidence is of two classes—direct and positive, presumptive and circumstantial—and if the evidence in this case discloses that a portion of the evidence is indirect, presumptive (648) and circumstantial, then in the consideration of such indirect, presumptive and circumstantial evidence the jury must be convinced that such circumstances are absolutely incompatible, upon any reasonable hypothesis, with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than the guilt of the accused, and if the jury is not so convinced of the guilt of the defendant from such indirect, presumptive and circumstantial evidence, together with the direct and positive evidence, the verdict must be to acquit the defendant.

XXII.

The court erred in refusing to give to the jury the following instruction:

INSTRUCTION No. 3.

The jury is further instructed that the rule of law which clothes every person accused of crime with the presumption of innocence, and imposes upon the Government the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly con-

victed. By a reasonable doubt is meant that kind of a doubt interposed in the graver transactions of life, after comparison and consideration of the facts and testimony involved, would cause a reasonable and prudent man to hesitate and pause. It follows, therefore, that after such consideration the jury should acquit defendant unless they can feel an abiding conviction to a moral certainty of the truth of the charge beyond a reasonable doubt.

XXIII.

The said court erred in refusing to give to the jury the following instruction:

INSTRUCTION No. 4.

The jury is further instructed that the presumption of innocence is not a mere form, to be disregarded at pleasure, but it is an (649) essential, substantial part of the law of the land and binding on the jury in this case, as in all criminal cases; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption which clings to him, surrounds, shields and protects him throughout the entire trial of this case, and to acquit the defendant unless the evidence in the case convinces you of his guilt as charged, beyond all reasonable doubt.

XXIV.

The court erred in refusing to give to the jury the following instruction:

INSTRUCTION No. 6.

The jury is instructed that if the testimony in this case in its weight and effect be such that two conclusions can be reasonably drawn from it, the one favoring the innocence of the defendant, and the other tending to establish his guilt, the law makes it your duty to accept the conclusion tending towards the innocence.

XXV.

The court erred in refusing to give to the jury the following instruction:

INSTRUCTION No. 7.

The jury is instructed that the witness Laura Herrington is in law a competent witness; but the credibility of her testimony and how far she is to be believed is to be determined by the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. It is one thing whether the testimony of a witness be heard, another thing whether that testimony be believed when it is heard. It is true that the accusation of rape is one easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent.

XXVI.

The court erred in refusing to give to the jury the following instruction:

INSTRUCTION No. 8.

The jury is instructed that the testimony of the

witness (650) Laura Herrington should be cautiously scrutinized, and the jury should diligently guard themselves from the undue influence of the sympathy in her behalf which her testimony is apt to incite. If she concealed or imparted information of the offense, the person to whom such information was imparted, as well as the place of the commission of the offense charged, the surroundings, the time, the season, the condition of weather, these and other circumstances should be considered by the jury; also the manner in which she testifies, the consistency of her testimony, its probability or improbability, and her demeanor on the witness stand should be fairly and carefully viewed by the jury, before the jury is satisfied with the truth of her evidence.

XXVII.

The court erred in refusing to give to the jury the following instruction:

Instruction No. 10.

In the second count in the indictment the defendant is charged with an attempt to commit the crime of statutory rape, by carnally knowing and abusing one Laura Herrington, she being at the time under the age of sixteen years and he being over that age.

An attempt to commit a crime is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the sub-

stantive crime. There is a class of acts which may be done in pursuance of an intention to commit a crime, but not in legal sense a part of it, and so not constitute an indictable attempt; such as the purchase of a gun with the design of committing murder, or the procuring of poison with the same intent. These and like acts are considered in the nature of mere preliminary preparation, and not as acts towards the consummation of the crime. To institute an indictable attempt to commit the crime of statutory rape something more than intention is necessary and even more than solicitation.

It follows from these principles of law that if you find from the evidence, beyond a reasonable doubt, that at the house of said Laura Herrington, in Fairbanks, on the evening of February 14, 1916 (651), the defendant arranged and agreed with said girl (she then being under sixteen years of age and he being over that age) to meet her at the shop of J. P. Rose, on Lacey Street, in said town, on the evening of February 15, 1916, for the purpose of then and there having carnal intercourse with her; that on the evening of said February 15, 1916, defendant did go to said shop, and after getting there engaged in conversation with said Rose, who was present in said shop; but if you further find from the evidence or entertain a reasonable doubt of the truth thereof that, while in said shop on said evening, defendant committed no act in furtherance of said arrangement with Laura Herrington, but, on the contrary, for some or any reason, aban-

doned such arrangement and purpose; that after such abandonment of arrangement and purpose the said Laura Herrington came to the shop of said Rose pursuant to said arrangement, but the defendant did and said nothing to her in furtherance of such previous agreement at her home, then I charge you that he is not guilty of an attempt to commit rape as charged in said second count, and you should acquit him of such charge of attempt.

The defendant denies that he made any arrangements or had any agreement at any time with said Laura Herrington at her home, or at any other place, to have carnal intercourse with her on the evening of February 15, 1916, or at any other times, at the shop of J. P. Rose, on Lacey Street, in Fairbanks, or at any other place. If you believe from all the evidence in this case, both direct and circumstantial, that such denial is true, or entertain a reasonable doubt of its truth, then you must acquit of the charge of attempt contained in said second count.

XXVIII.

The court erred in refusing to give to the jury the following instruction:

Instruction No. 11.

If you find from the evidence that the said Laura Herrington at and before the time she gave her testimony before you was a person (652) of bad morals in the matter of chastity and was at such time unchaste, that fact of itself would not mean that the crime of statutory rape and the attempt

to commit such crime upon her, with her consent, could not be effected. Such evidence could only be considered by you as affecting her credibility as a witness (653).

XXIX.

The court erred in giving the following instruction to the jury:

NUMBER 12.

You are instructed that certain testimony has been admitted in this case for specified and limited purposes, which at the time of its reception by the court was so limited. You will bear in mind and confine yourself, in the consideration of such testimony, to the limited purpose for which it was so admitted.

A particular application of this instruction is directed to the evidence of the witness J. H. Miller, wherein he testified to statements made to him by Laura Herrington prior to the investigation testified to by him, said testimony having been admitted for limited purposes, as stated to the jury by the court at the time of its reception.

XXX.

The court erred in giving the following instruction to the jury:

NUMBER 15.

You are instructed that corroborating evidence must be such as tends to connect the accused with an alleged offense, and, as distinguished from evidence of the act itself, is additional evidence of

a different character to the same point. It means to strengthen, to add weight or credibility to a thing (654).

XXXI.

The court erred in giving the following instruction to the jury:

Number 17.

You are instructed that there are two general classes of evidence—direct and circumstantial. Evidence as to the existence of the main fact in issue, is direct evidence; while circumstantial evidence relates to the existence of facts which raise a logical inference as to the existence of the fact in issue.

You are instructed that circumstantial evidence is legal and competent evidence, and if it be of such a character as to exclude every other reasonable hypothesis than that of the defendant's guilt, then it is sufficient to warrant a conviction. In other words, such evidence is sufficient to warrant a conviction when it convinces the minds of the jury of the guilt of the accused beyond a reasonable doubt.

It is not necessary to prove the defendant's guilt by the testimony of eye-witnesses who have seen the offense committed, but such guilt may be established by facts and circumstances from which it may be reasonably and satisfactorily inferred, provided such facts and circumstances establish such guilt beyond all reasonable doubt.

Circumstantial evidence is to be regarded by the jury in all cases where it is offered. It is some-

times quite as conclusive in its convincing power as the direct and positive testimony of eye-witnesses; and when it is strong and satisfactory the jury should so consider it, neither enlarging nor belittling its force. But in order to warrant a conviction on circumstantial evidence, the circumstances taken together should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused and no one else committed the offense charged (655).

And it is an invariable rule of law that to warrant a conviction upon circumstantial evidence, such facts and circumstances must be shown as are consistent with the guilt of the person charged, and as cannot upon any reasonable theory be true and the person charged be innocent.

XXXII.

The court erred in giving the following instruction to the jury:

Number 18.

You are instructed that a person charged with the commission of a crime shall, at his own request, but not otherwise, be deemed a competent witness in his own behalf, the credit to be given to his testimony being left entirely to the jury, under the instructions of the court.

And you are instructed that in this case the credit to be given to the testimony of the defendant

W. H. Wooldridge is left solely to you, and you should give it the same fair and candid consideration you do to the testimony of other witnesses in the case, but you have a right to take into consideration the interest of the defendant in the result of this trial, as affecting his credibility (656).

XXXIII.

The court erred in giving the following instruction to the jury:

NUMBER 22.

You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of sixteen years shall be incapable of consenting to the act of sexual intercourse, and that anyone committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her consent thereto; and whether the girl in fact consented or resisted is immaterial in this case.

In the present case, neither the element of force nor the question of consent has any application.

The witness Laura Herrington could not consent, and the law resists for her.

XXXIV.

The court erred in giving the following instruction to the jury:

NUMBER 26.

Evidence has been admitted tending to show that the witness Laura Herrington informed Ed Hall, shortly after the commission of the crime charged

in the first count of the indictment, that she had been ravished by the defendant. Such information, if any, would not be evidence corroborating the testimony of said witness tending to connect the defendant with the commission of the offense of rape, if such offense was committed. The evidence of such information was admitted as tending to confirm or corroborate the truth of her testimony. The law is, that a failure by one, who claims the crime of rape to have been committed upon her, to immediately inform, is looked upon as a suspicious circumstance that her story is a fabrication. Hence, the testimony of such (657) information was admitted for the purpose of testing the accuracy and veracity of the witness Laura Herrington, and for no other purpose.

XXXV.

The court erred in giving the following instruction to the jury:

NUMBER 28.

The intent to have sexual intercourse, where the female is under the age of consent, is an essential element in the crime, and must be proved beyond a reasonable doubt; and this may be done by proof of any facts or circumstances tending to show such intent.

XXXVI.

The court erred in giving the following instruction to the jury:

NUMBER 32.

You are instructed that with reference to the second count of the indictment, an attempt to com-

mit a crime is composed of two elements: First, the intent to commit it; and second, a direct ineffectual act done towards its commission. The act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation. While it need not be the last proximate act to the commission of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward (658) the commission of the offense after the preparations are made.

Applying these principles of law, if you find from the evidence, beyond a reasonable doubt, that at the home of Laura Herrington in Fairbanks, on the evening of February 14, 1916 (the said Laura Herrington being under the age of sixteen years and the defendant being over the age of sixteen years), the defendant arranged and agreed with the said Laura Herrington to meet her at the shop of J. P. Rose, on Lacey Street, in said town, on the evening of February 15, 1916, for the purpose of then and there having unlawful and felonious sexual intercourse with her, and that in pursuance of said arrangement the said Laura Herrington kept her appointment by going to said shop as agreed, and was there met by the defendant still intending to carry out said arrangement to have unlawful and felonious sexual intercourse with her, and regardless of whether said Laura Herrington would or would not have continued to surrender

herself to the completed act of sexual intercourse, you further find, beyond a reasonable doubt, that without any change of purpose or intent on the part of the defendant he was prevented from perpetrating said crime by the intervention of any outside agency, then I instruct you that he is guilty of attempt to commit rape as charged in the second count of the indictment. If, on the other hand, you find from the evidence that the defendant, on the 14th day of February, 1916, simply solicited the said Laura Herrington (659) to have unlawful and felonious sexual intercourse with him at the shop of J. P. Rose on the evening of February 15, 1916, and thereafter made no arrangement, nor attempted to make any arrangement with the said J. P. Rose for the use of said shop for said unlawful and felonious purpose, and entirely abandoned said arrangement with Laura Herrington, then you should acquit the defendant of the charge contained in the second count of the indictment (660).

XXXVII.

The court erred in refusing to grant a new trial to defendant upon his motion duly made therefor.

XXXVIII.

The court erred in refusing to grant defendant's motion in arrest of judgment.

XXXIX.

The court erred in pronouncing judgment and sentence upon the defendant.

Wherefore, the said defendant and plaintiff in error prays that the judgment of the said District Court for the Fourth Division of the Territory of Alaska be reversed and that said District Court be directed to dismiss the indictment in said cause or to grant a new trial of said cause.

T. A. MARQUAM,

BION A. DODGE,

Attorneys for Defendant and Plaintiff in Error.

## ARGUMENT.

## POINTS AND AUTHORITIES.

### I.

The first assignment of error is for overruling objection to the introduction of any testimony whatever under the second count of the indictment, for the reason and upon the grounds that the statement of facts set forth therein do not constitute a crime. A discussion of this assignment of error involves many sections of the Compiled Laws of Alaska, 1913.

(a) Section 1894, to which Section 2073 is so closely related in this case, was taken from the revised statute of Ohio, and as this statute is different from the Oregon statute on the subject of rape, it therefore follows that the form of the indictment prescribed by the Oregon statute and enacted into law by the Alaska code, is not applicable to the Ohio statute, which is the Alaska statute.

Nebraska has a similar statute. The Ohio statute is as follows:

"Whoever has carnal knowledge of a female person, forcibly and against her will or, being eighteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of Rape."

The Alaska statute is as follows: "That whoever has carnal knowledge of a female person forcibly and against her will, or, being sixteen years of age, carnally knows and abuses, a female person under sixteen years of age, with her consent, is guilty of Rape."

The Oregon statute is as follows: "If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female, such person shall be deemed guilty of Rape."

The Nebraska statute is as follows: "Or if any male person of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste shall be deemed guilty of Rape."

Bates Annotated Statutes of Ohio, Sec. 6816.
Lord's Oregon Laws, Sec. 1912.
*State v. Carl*, 71 Ohio St. 259.
*Hubert v. State* (Neb.), 104 N. W. 276.
*Hall v. State* (Neb.), 58 N. W. 929.
*Morgan v. State*, 50 S. W. 718.

*State v. Wheat,* 22 Atl. 720.
*State v. Horne* (Ore.), 26 Pac. 665.
Bishop's Statutory Crimes, Sec. 495.
Revised Statutes of Nebraska, Sec. 8588.

(b) The Alaska code provides "that the manner of stating the act constituting the crime as set forth hereinafter is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit."

Now as these forms given are applicable to the Oregon statute on this subject and not to the Alaska and Ohio statutes, the form of indictment used should be that which governs the Ohio statute.

Secs. 1894, 2073, 2149, Comp. Laws of Alaska, 1913.
Bates Annotated Statutes of Ohio, Sec. 6816.
No. 170093, Vol. 15, Enc. of Forms, 570.
*State v. Hensley,* 75 Ohio St., 261.
*State v. Lawrence,* 74 Ohio St., 38.
*State v. Carl,* 71 Ohio St., 259.

(c) Furthermore, the common law is applicable to Alaska.

Secs. 796, 2099, Comp. Laws of Alaska, 1913.

(d) The Alaska statute contains both the common-law definition of rape and creates a new offense called statutory rape, which latter offense being in derogation of the common law, must be construed strictly. Where a statute prescribing a pen-

alty is susceptible of two constructions, that construction which is most favorable to defendant must be given by the court.

Title XIV, Criminal Code of Alaska in Comp. Laws of Alaska, 1913.

*U. S. v. Doo-noch-keen,* 2 Alaska Rep. 624.

(e) Now under the laws of Alaska the indictment may be set aside (1) on motion; (2) by demurrer; (3) by objections at time of trial; and (4) motion in arrest of judgment. And while in this case neither of the first two courses were pursued, objections to the introduction of evidence was duly made at the time of the trial on the grounds that the facts stated in the indictment did not constitute a crime, and after the verdict of guilty a motion in arrest of judgment was duly made, both of which were overruled by the court and exceptions taken.

Secs. 2191, 2197 and 2207, Comp. Laws of Alaska, 1913.

(f) In criminal pleadings, such as indictments setting forth a statutory crime, the courts generally hold that they must be technically exact, so that the defendant may be duly informed of the sort of proof he will have to meet.

Bishop's New Criminal Procedure, Vol. 2, p. 612.

*People v. Maxon,* 10 N. Y. Supp. 593.

*Lehman v. People,* 49 Am. Dec. 340.

*State v. Skillman,* 128 S. W. 729.

*Alexander v. State*. 127 S. W. 189.
*Crasman v. State,* 129 S. W. 1129.
*Hall v. State* (Neb), 58 N. W. 929.
*Reinoehl v. State* (Neb.), 87 N. W. 355.
*George v. State* (Neb.), 85 N. W. 84.
*Farrel v. State* (N. J.), 27 Atl. 723.
*Pratt v. State,* 23 Ohio St. 514.
*Hagen v. State,* 35 Ohio St. 268.
3 Cyc. 1444.

(g) The indictment charging the crime alleged in this case must charge facts amounting to an actual beginning of the consummation of the crime or offense. **Mere intention to commit the offense, and solicitation and preparation for its commission are not sufficient. Some overt act must be done toward its commission after the preparations are all made.**

12 Cyc. 177-183.
*O'Nealy v. State,* 17 Ohio St. 516-518.
*Smith v. State,* 12 Ohio St. 466.
Bishop's New Criminal Procedure, Vol. 3, Secs. 71, 81, 82.
*State v. Frazier,* 36 Pac. 58.
*State v. Williams,* 41 Tex. 98.
*Alexander v. State*. 127 S. W. 189.
*High v. Barr*. 100 Pac. 48.
*State v. Russel,* 68 Pac. 616.
*Robinson v. State,* 44 S. E. 814.
*People v. Everett,* 101 Pac. 528.
*State v. Landers*. 42 L. R. A. (N. S.), 424.
*U. S. v. Williams* (Ore.), 2 Fed. 61.

*State v. Taylor* (Ore.), 84 Pac. 82.
*State v. Douglas*, 42 L. R. A. (N. S.), 524.
Wharton's Criminal Law, Vol. 1, 268-280. 280.
33 Cyc. 1431, and note.

II.

Assignment of errors II, III and IV should be sustained, for the reason that while testimony of the mere voluntary complaint *only* of the prosecutrix on a charge of rape may be admitted if made right after the alleged outrage, the details and the name of the person accused should be excluded.

*State v. Hoskinson*, 96 Pac. 138.
*People v. Wilmot*, 72 Pac. 838.
*State v. Birchard*, 59 Pac. 468.
*State v. Oswalt*, 82 Pac. 586.
*State v. Griffin*, 86 Pac. 954.
*Rogers v. State*, 41 L. R. A. (N. S.), 886.
Wigmore on Evidence, Secs. 1134 and 1135.
Greenleaf on Evidence (16 Ed.), Vol. 1, Secs. 162*h* and 469*c*; Vol. 3, Sec. 213.
Wharton's Criminal Law, Sec. 746.

III.

The fifth assignment of error is well taken, because the conclusions of the witness George Berg as to what was said and done in Rose's shop on the evening of February 15, 1916, should not be allowed to stand against this plaintiff in error, Wooldridge.

17 Cyc. 25.
Wigmore on Evidence, Sec. 657.

Greenleaf on Evidence (16 Ed.), Vol. 1, Sec. 441*b*.

IV.

The testimony set forth and referred to in the sixth, seventh, eighth, ninth, tenth, eleventh and twelfth assignments of error is clearly hearsay, incompetent, immaterial and irrelevant, and was in the absence of the defendant.

*State v. Hoskinson* (Kan.), 96 Pac. 140.

33 Cyc. 1467, 1468.

Greenleaf on Evidence (16 Ed.), Vol. 1, Secs. 98, 99.

Wigmore on Evidence, Secs. 1360, 1420.

V.

The testimony of the grand jurors described in Assignment of Error XIII was produced and permitted for the purpose of impeaching J. P. Rose, the Government's own witness, but the proper foundation had not been laid.

40 Cyc. 2559-60, 2691, 2740.

Greenleaf on Evidence (16 Ed.), Vol. 1, Sec. 252.

VI.

It was evident error, as set forth in the fourtetenth assignment of error, for the court below to permit the introduction in evidence of the alleged written and signed statement of the witness J. P. Rose, marked Plaintiff's Exhibit 1, for the purpose of impeaching Rose, for the reasons that Rose was the prosecution's own witness, no proper foundation was laid to impeach him, and the witness Rose

was not permitted to read over and inspect said written and signed statement, but he was questioned generally and specifically on wholly the same. Nor was defendant's counsel permitted to inspect said statement before said witness testified, as is required and provided by law.

Secs. 1501, 1502 and 1504, Comp. Laws of Alaska, 1913.

Greenleaf on Evidence (16 Ed.), Vol. 1, Secs. 442 and 463.

VII.

The questions to and the answers of the prosecuting witness, Laura Herrington, referred to in the fifteenth assignment of error, were clearly inadmissible and should have been stricken from the record, for the reasons that they were so arrogantly leading and suggestive and were not proper in redirect examination, and the court erred in granting permission to ask such questions as part of the direct examination, since the same had been fully covered in the original direct examination.

*State v. Ogden* (Ore.), 65 Pac. 449.

*Nurnberger v. U. S.*, 166 Fed. 721.

*Henry v. Sioux City P. R. Co.* (Iowa), 23 N. W. 260.

Greenleaf on Evidence (16 Ed.), Vol. 1, Sec. 434.

VIII.

The second fifteenth assignment of errors is well taken, for the reason that a proper foundation of such impeachment had been laid, as it appeared

that the impeaching witness was about to speak concerning the same conversation to which the attention of the principal witness, Exena Herrington, had been called on her cross-examination.

40 Cyc. 2740.

*Lawler v. McPheeters,* 73 Ind. 577.

50 Century Digest, Par. 1247.

IX.

An indictment is a public record and as such subject to inspection. The accused was entitled to any evidence that would explain or throw any light upon the testimony of the witness Rose, his motive, purpose, etc. It was apparent that Rose testified under a severe and mental strain. Under duress he made certain statements to the U. S. deputy marshals quite contradictory to the actual facts. The nature of the duress was apparent from the fact that five deputy marshals were hovering over him in the marshal's office at the time. and subsequently a secret indictment was found against him, charging him with the statutory offense of rape. At the time of his making the statement concerning the Wooldridge affair it is a fair inference that the charge against him was held over him. When he was on the stand his manhood prompted him to tell the truth and exonerate Wooldridge, whereupon he was confronted with the statement theretofore made and impeached, which impeachment and the written statement had such an effect upon the minds of the jury as to result in a verdict of guilty

upon the second count in the indictment. If Rose had been indicted on March 2, as is claimed and the records both in the court at Fairbanks and in this court show, and a bench warrant for his arrest had been ordered by the court, there was certainly no excuse why the same should not have been served, except for the purpose of holding the same secret and as a threat over the witness Rose until after the trial of this case.

Sections 1871 and 2140, Comp. Laws Alaska, 1913.

17 Cyc. 457.

X.

The motions for directed verdicts of not guilty upon the second count in the indictment set forth in the seventeenth and nineteenth assignments of error should have been sustained, for the reasons that there were no overt acts done toward the commission of the crime charged, as according to the prosecution's own witnesses there was at the most only solicitation and preparation, which are entirely insufficient.

33 Cyc. 1431, and note.

*State v. Taylor* (Ore.), 84 Pac. 82.

Other authorities cited under subdivision (g) of paragraph I hereof.

XI.

The prosecution should have elected upon which count in said indictment it would stand and have

a verdict found as claimed by plaintiff in error in Assignment of Error XVIII.

Abbott's Trial Brief (Crim.), 295.

Bishop's New Criminal Procedure, Vol. 1, Secs. 374, 384, 459, 461.

XII.

Instructions numbered 1, 2, 3, 4, 6, 7, 8, 10 and 11, requested by said defendant Wooldridge in the lower court, as set out in Assignments of Error XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII, should have been given by the court.

12 Cyc. 633-637.

33 Cyc. 1485.

Section 1501, Comp. Laws Alaska, 1913.

*State v. Taylor* (Ore.), 84 Pac. 83.

*State v. Hoskinson,* 96 Pac. 138.

*State v. Apley,* 48 L. R. A. (N. S.), 269 and note.

*State v. Roderick* (Ohio), 14 L. R. A. (N. S.), 715.

*Stockslager v. U. S.,* 116 Fed. 599.

Hughes, Instructions to Juries, Secs. 713-715.

XIII.

As to Assignment of Error XXIX, the court surely erred in giving Instruction No. 12 to the jury without directing the jury's attention to the particular evidence referred to and to the particularly specified and limited purpose for which it was so admitted, and the court should have instructed the jury that all the evidence of the witness J. H. Miller

with reference to any conversation upon the part of Laura Herrington was hearsay evidence, incompetent for any purpose and withdrawn from the jury.

12 Cyc. 631.

*State v. Miller* (Iowa), 46 N. W. 751.

XIV.

Instructions numbered 15 and 26, as set out in Assignments of Error XXX and XXXIV, given to the jury by the court and relating to corroborating evidence, did not state the law correctly or completely and should not have been so given.

*Henderson v. State* (Neb.), 26 L. R. A. (N. S.), 1149.

Note to *Ohio and Mississippi R. Co. v. Stein,* 19 L. R. A. 744.

XV.

The instructions of the court numbered 17 and 22, set forth in Assignments of Error XXXI and XXXIII, are not correct statements of the law involved and attempted to be covered and charged in said instructions, nor are the errors corrected or cured by any correct instructions given elsewhere in the case.

Hughes, Instructions to Juries, Secs. 730-732.

XVI.

The thirty-second assignment of error is to the eighteenth instruction of the court, wherein the court singled the defendant out from all the other

witnesses in the case and laid special stress on the question of his interest on the result of the trial, when as a matter of fact and law somewhat similar instructions should apply to all witnesses in the case if the jury believe they had any interest in the result of the trial, and such instructions should have been given as particularly applicable in this case, where it was shown so conclusively by the prosecution's own witnesses that the marshal and United States attorney, their deputies and agents, were all interested in the outcome of the trap they had conspired and laid together, and so were interested in the result of the trial. The eighteenth instruction should have been given with the tenth instruction.

12 Cyc. 636-638.

*Argabright v. State* (Neb.), 69 N. W. 102.

XVII.

Instruction 28 given to the jury by the court, as set forth in Assignment of Error XXXV, was incomplete, misleading and an incorrect statement of the law upon the question of intent and the necessary proof required to prove such intent upon the part of the said defendant. Also the said Wooldridge could and did testify to his own intent.

Bishop on Criminal Law, Sec. 759.

*Roberts v. The People,* 19 Mich. 401.

Sackett's Instruction to Juries, 488.

Wigmore on Evidence, Sec. 581.

*Brown v. Hickle* (Iowa), 27 N. W. 276.

12 Cyc. 403.

XVIII.

Assignments of Error XXXVI, XXXVII, XXXVIII and XXXIX are all well founded, XXXVI for the reason that Instruction 32 of the court to the jury is involved, contradictory in itself, misleading, not applicable to the issues presented by the indictment or the evidence in the case, that it is not the law of the case from any standpoint, and the hypothesis upon which it is based fails to collate all the material elements of the charge as a basis for the conclusion of the court.

And Assignments of Error XXXVII, XXXVIII and XXXIX for the reasons set forth in said motion for a new trial and motion in arrest of judgment, and particularly because of (1) the facts stated in the second count of said indictment do not constitute a crime, as is fully argued under Paragraph I of this argument; (2) irregularities in the proceedings of the court and abuse of discretion exercised by the court by which defendant was prevented from having a fair trial, in improperly excusing the jurors J. E. Getrall and A. J. Painter, members of the regular panel, from service on the jury in this case after they had properly qualified as such jurors and during the trial the court corrected counsel for defendant when said counsel referred to the prosecutrix as a woman and the court stated in substance "you mean this child" when the authorities hold that it is at the age of puberty and not at majority where the female ceases to be a child; (3) insufficiency of the evidence to jus-

tify said verdict of guilty, there having been no overt act done, shown or testified to having been done toward the commission of the crime and solicitation and preparation are entirely insufficient, even if admitted, which they are not. The indictment charges that the alleged crime was committed on February 14, while the evidence shows that if any offense whatever was committed it was on February 15; (4) admission of details and name of party accused in testimony of Laura Herrington, Ed Hall and Catherine Herrington in connection with complaint; (5) admission of hearsay evidence in the absence of defendant when the scheme was being worked out to lay a trap for Wooldridge, and particularly the testimony of the deputy marshals, Miller, Berg, McMullen and Hall, and witnesses J. P. Rose and Laura Herrington as to what was said and done by them and each of them in the United States attorney's office, in the marshal's office and elsewhere, relative to the offense charged to have been committed.

12 Cyc. 176-183, 631.

*State v. Wise* (Iowa), 50 N. W. 59.

*State v. Taylor* (Ore.), 84 Pac. 83.

33 Cyc. 1431, 1467-1468.

*State v. Hoskinson* (Kan.), 96 Pac. 138.

*State v. Griffin* (Wash.), 86 Pac. 951.

*State v. Frazier* (Kan.), 36 Pac. 58.

*State v. Russell* (Kan.), 68 Pac. 615.

*U. S. v. Doo-noch-keen,* 2 Alaska Rep. 624.

*O'Nealy v. State,* 17 Ohio St. 516-518.

*Blackburn v. State,* 22 Ohio St. 102.

Wigmore on Evidence, Secs. 1134, 1135, 1360, 1420.

Secs. 1501, 1502 and 1504, 2207, Comp. Laws of Alaska, 1913.

Wharton's Criminal Law, Vol. 1, 268-280.

Bishop's New Criminal Procedure, Vol. 3, Secs. 71, 81, 82.

## CONCLUSIONS.

We therefore submit that the District Court was in error in excusing the jurors J. E. Gatrell and A. J. Painter, members of the regular panel, after they had qualified to serve in this case.

That the Alaska statute against rape having been borrowed directly from the Ohio statute on rape, which is different from the Oregon statute on that offense, it therefore follows that the forms of indictment prescribed by the Oregon statute and enacted into law by Congress for Alaska, are not applicable.

That the second count of the indictment does not contain a statement of facts sufficient to constitute the offense of an attempt to commit the crime of rape charged therein against the plaintiff in error.

The facts amounting to an actual beginning of the consummation of the crime should have been charged in the indictment, which was not done.

That charging facts showing intention to commit the offense and solicitation and preparation for its commission are not sufficient as some overt

act done toward its commsision after all preparations have been made, must be charged in the indictment, and no such acts were so charged in the second count of this indictment.

That the defendant's objections to the introduction of any testimony whatever under the second count of this indictment should have been sustained.

That permitting the witness Laura Herrington, Ed Hall, and Catherine Herrington to testify as to the details and the person accused when the prosecutrix made complaint is plainly reversible error.

That the clearly hearsay, incompetent, immaterial and irrelevant testimony of J. H. Miller, George Berg, P. McMullen, Frank Hall, J. P. Rose, and Laura Herrington as to what was said and done in the United States attorney's office, in the marshal's office, and elsewhere, all in the absence of defendant, should have been excluded, and it was reversible error for the court to admit the same, so prejudicial to the defendant.

That the lower court committed reversible error in permitting the government's counsel to examine the witness Rose as he did upon the alleged written statement of Rose introduced as Plaintiff's Exhibit 1, for the purpose of impeaching his own witness and without permitting the witness Rose or the defendant's counsel to inspect said written and signed statement until after the conclusion of the direct examination of said witness when it was intro-

duced in evidence and read to the jury to the great prejudice of defendant.

That the predudicial rulings of the court prevented the defendant from having a fair and impartial trial.

That there was no testimony whatever showing that there was any overt act or any acts on the part of Wooldridge toward making an attempt to commit the crime of rape upon the person of Laura Herrington.

That there is not a scintilla of evidence to show that defendant took or attempted to take the key of the front door of Rose's repair shop alleged to have been hanging on the wall.

That there is not an iota of evidence that defendant touched the prosecutrix or even made an attempt to touch her.

That there is no evidence whatever showing that the defendant said anything to the prosecutrix at the repair shop about having sexual intercourse with her.

That defendant left Rose's repair shop as soon as the prosecutrix came in.

That even if all the testimony of the prosecutrix be admitted to be true, which it is not, there was nothing more than solicitation and preparation shown, all of which is absolutely insufficient.

That the defendant's motions for directed verdicts at the close of the prosecution's case in chief and after all the evidence was in, should have been sustained, particularly as to the second count of

the indictment, for it was plainly evident that the evidence was insufficient.

That the defendant's motion for a new trial should have been granted for the many well founded grounds and reasons therein stated.

That defendant's motion in arrest of judgment should have been granted for the reason that the facts stated in the said second count of the indictment were not sufficient to constitute a crime even if proven.

That finally, not only in justice to this defendant and plaintiff in error, but also that the people of the territory of Alaska may be assured and guaranteed that the courts so established by the National Government and the only courts they have shall give to them fair and impartial trials, such as they are entitled to under the Constitution, this Federal judgment should be reversed and this indictment dismissed or a new trial of said cause granted.

Respectfully submitted,

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